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Nos. 83-498 & 83-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY, *et al.*,
Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*,
Appellees.

MARTIN DANZIGER, ACTING CHAIRMAN, THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY, *et al.*,
Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*,
Appellees.

On Appeals from the United States Court of Appeals for the Third Circuit

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BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

This case involves the constitutionality of § 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. § 5:12-93 (West Supp. 1983-1984), which provides in relevant part:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

The questions presented are:

1. Should this Court direct dismissal under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, although (a) the New Jersey Attorney General seeks an "immediate adjudication" of the merits by this Court and (b) plaintiffs were unable to obtain a decision from a State tribunal prior to the effective date of the Casino Control Commission's order against them?

2. Is § 93 preempted by the National Labor Relations Act, because it undermines employee rights granted therein, and (insofar as it disqualifies unions from administering pension and benefit plans) by ERISA, because it "relates to any employee benefit plan" within the meaning of ERISA § 514(a)?

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BRIEF FOR APPELLEES[1]

STATEMENT OF THE CASE

1. *New Jersey's Regulation of Casino Gambling.*

The Court of Appeals succinctly outlined the state statutory scheme that is the subject matter of this case:

> In 1977 the New Jersey Legislature passed the Casino Control Act (the Act), which authorizes the licensing of hotels in Atlantic City for casino gambling. That act establishes a Casino Control Commission with broad regulatory authority over casinos and related industries. N.J.Stat. Ann. 5:12-63 to -75 (West Supp. 1982) It also establishes in the Department of Law and Public Safety, which the Attorney General heads, a Division of Gaming Enforcement, charged with responsibility for investigating all applicants for licenses, certificates, or permits, and prosecuting before the Commission or in the state criminal courts all proceedings for violation of the Act or regulations promulgated under it. N.J.Stat. Ann. 5:12-76 to -79 (West Supp. 1982). The Act requires licensing not only of casinos, but of casino key employees (supervisors), N.J.Stat. Ann. 5:12-89 (West Supp. 1982), and of casino employees. N.J.Stat. Ann. 5:12-90 (West Supp. 1982). Casino hotel employees include those performing "service or custodial duties not directly related to operations of the casino, including, without limitations, bartenders, waiters, waitresses, maintenance personnel, kitchen staff, but whose employment duties do not require or authorize access to the casino." N.J.Stat. Ann. 5:12-8 (West Supp.

[1] Throughout this brief: "J.S. App." will refer to the Joint Appendix to the Jurisdictional Statements; "Dep't. Br." will refer to the brief for appellants G. Michael Brown, Director Department of Law and Public Safety, Division of Gaming Enforcement, *et al.*, in No. 83-498; "Comm'n. Br." will refer to the brief for appellants Danziger, *et al.*, in No. 83-573; and "Supp. App." will refer to the Supplemental Appendix of excerpts from the record separately filed herewith.

1982). For casino hotel employees the Act requires registration. N.J.Stat. Ann. 5:12-91 (West Supp. 1982). Section 86 of the Act lists criteria for the disqualification of casino licensees, and the section dealing with registration of casino hotel employees authorizes the Commission to revoke, suspend, limit or otherwise restrict the registration of any such employee who would be disqualified for a license. N.J.Stat. Ann. 5:12-86, -91(b) (West Supp. 1982). All industries offering goods or services to the casinos must also be licensed and are subject to the disqualification criteria of section 86. N.J.Stat. Ann. 5:12-92 (West Supp. 1982).

Particularly relevant to this case is the provision in section 93 of the Act, requiring that every labor organization seeking to represent employees licensed or registered under the Act and employed at a casino hotel register with the Commission annually. N.J.Stat. Ann. 5:12-93(a) (West Supp. 1982). Section 93 also provides:

> No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

N.J.Stat. Ann. 5:12-93(b) (West Supp. 1982). Thus section 93 cross-references to the disqualification criteria in section 86. [J.S. App. 5a-6a.]

Section 86 of the Casino Control Act referred to by the Court of Appeals sets out multiple "disqualification cri-

teria" of great breadth and generality, including the following which are central here:

* * * *

> b. *Failure of the* [*individual*] *to provide information, documentation and assurances* required by the act or *requested by the commission*, or failure of the [individual] to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria;
>
> * * * *
>
> f. *The identification of the* [*individual*] *as* a career offender or a member of a career offender cartel or *an associate of a career offender* or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations; * * * [J.S. App. 248a, 254a; emphasis added.] [2]

2. ***Hotel and Restaurant Employees Local 54.***

Appellee, Hotel and Restaurant Employees and Bartenders International Union Local 54, is an unincorporated labor organization within the meaning of § 2(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(5). The Local's geographic jurisdiction, by virtue of its International Union charter, extends from Atlantic County, New Jersey up north to Ocean County and from Atlantic County west to Camden County.

Local 54 represents, and engages in collective bargaining on behalf of, approximately twelve thousand (12,000) employees, eight thousand (8,000) of whom are employed in casino hotels in Atlantic City, New Jersey. All of the Local's members employed in casino hotels work in traditional hotel and restaurant service related positions (*viz.*,

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[2] "Career offender," in turn, is defined in § 86(f) as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State."

as cooks, doormen, chambermaids, bartenders, and waitresses); none are employed in direct gaming positions (*viz.*, as dealers, cashiers, security personnel and the like).

Local 54, including its constituent predecessor locals, has represented hotel and restaurant service employees in Atlantic City and other locations within its jurisdiction since 1902. (Plaintiffs' Exhibit 9.) The Local's activities encompass the full scope of normal representational activity including, *inter alia*, contract negotiations, processing of employee grievances via contract grievance and arbitration procedures, and the maintenance of a hiring hall. (See Plaintiffs' Exhibits 6, 7 & 9.)

The same Local 54 business agents and employees who bargain collectively for, and provide representational services to, employees of casino hotels act on behalf of employees of non-casino establishments. The union hall, the hiring hall facilities and the staff of officers, business agents and employees essential to providing the full gamut of representational services provided to the Local's members are funded by a common pool of dues moneys collected from all of its members, again with no distinction between those who are employed in casino hotels and those who are employed elsewhere. (See Plaintiffs' Exhibits 6, 7 & 9.)

As a result of Local 54's collective bargaining efforts, its members also participate in the Hotel and Restaurant Employees and Bartenders International Union Welfare and Pension Funds and the Hotel and Restaurant Employees and Bartenders International Union Local 54 Severance Fund. (See Plaintiffs' Exhibits 5 & 8.) These are jointly administered employee benefit funds established pursuant to § 302 of the Taft-Hartley Act, 29 U.S.C. § 186, and regulated and administered pursuant to the terms of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (Plaintiffs' Exhibits 5 & 8.)

Appellee, Frank Gerace, is President of Local 54, and is a trustee to the International Welfare and Pension Funds. (See Plaintiffs' Exhibit 5.) Mr. Gerace and other officers of the Union also serve as trustees to the Severance Fund. (See Plaintiffs' Exhibit 8.)

3. *The Events Leading to This Case.*

When casino gambling in Atlantic City was made lawful, Local 54 was already the duly authorized collective bargaining agent for employees of those hotels which were converting to casino operations. In 1978, the Union and its officers, agents and employees filed the required registration statements.

In September 1980, Eugene M. Schwartz, Deputy Attorney General for the State of New Jersey assigned to the Department of Law and Public Safety's Division of Gaming Enforcement ("Division"), contacted counsel for Local 54 and demanded that Robert Lumio, then the Local's Secretary-Treasurer, appear at the Division offices to be questioned under oath by Division personnel without the presence of counsel and without assurances that Mr. Lumio could consult with counsel outside the examination room during the questioning. Mr. Schwartz additionally advised that the failure of Mr. Lumio to appear under these conditions "will be evaluated in accordance with the criteria delineated in the applicable provisions of the Casino Control Act and the Division will take whatever action is deemed appropriate." Supp. App. 1a-2a. Mr. Schwartz was advised that Mr. Lumio was hospitalized with leukemia and physically unable to appear for the requested interrogation. Further, the Division's demands concerning the conditions of its interrogation of Mr. Lumio were objected to and the Division was asked to provide the basis in law for the institution of such an inquisatorial system. *Id.* 3a-4a.

Over the next year and a half, there was an exchange of correspondence wherein representatives of the Division of Gaming Enforcement insisted that Mr. Lumio ap-

pear to be interrogated notwithstanding his hospitalization (which involved painful radiation and chemotherapy treatments),[3] and representatives of the Local, without securing a response, continued to request that the Division provide the basis in law for the Division's stated conditions with respect to the interrogation. Finally, in a letter dated February 1, 1981 the Division appeared to concede that Mr. Lumio was, in fact, seriously ill and, on that basis, to be willing to postpone his interview indefinitely.

The Division of Gaming Enforcement then, however, demanded that Frank Gerace, President of Local 54, appear for an interview under oath. Mr. Gerace responded by agreeing to appear with counsel at the Division's offices. Supp. App. 43a-44a. Thereafter, on March 16 1981, Mr. Gerace accompanied by counsel did appear at the Division's offices. Deputy Attorney General Kenneth J. Fortier, acting on behalf of the Division, as well as a police investigator for the Division and a stenographer were also present. Counsel affirmed on the record that Mr. Gerace was ready and willing to answer any question put to him under oath. Mr. Fortier, however, refused to ask any questions unless counsel left the room. An extensive dialogue on the record ensued wherein counsel reiterated that Mr. Gerace was ready, willing and able to answer any and all questions under oath but that counsel would not leave the room unless he was provided with the legal authority under which the Division was entitled to interrogate Mr. Gerace under its stated condi-

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[3] By letters dated December 15, 1980 and December 30, 1980, G. Michael Brown, the then Director of the Division of Gaming Enforcement, claimed that he had been advised by Mr. Lumio's attending physicians that Mr. Lumio was sufficiently recovered to appear at the demanded interview under oath. Supp. App. 15a-16a, 20a. Upon further investigation the attending physicians named by Mr. Brown in his letters specifically denied ever advising any agent of the Division that Mr. Lumio was, in fact, medically and physically capable of appearing to testify. See letters of January 16, 1981 and January 23, 1981, *id.* 26a-27a, 29a-30a.

tions. Mr. Fortier refused to cite any legal authority in support of the Division's position, refused to ask any questions and ultimately terminated the interview with the statement that Mr. Gerace had refused to cooperate and to respond to the Division's inquiries. See Supp. App. 45a-57a.

Immediately after the foregoing incident Mr. Fortier demanded that Mr. Lumio appear to be deposed. Supp. App. 58a. Mr. Fortier was advised that Mr. Lumio was again hospitalized. Supp. App. 59a-60a.

That demand was followed by a letter of complaint by the Division of Gaming Enforcement to the New Jersey Casino Control Commission alleging that Robert Lumio, Frank Gerace and other agents of Local 54 were not in compliance with various provisions of § 86 of the Casino Control Act. The Commission charged, *inter alia*, that Mr. Lumio and Mr. Gerace had failed to cooperate with the Division's investigations by refusing to participate in the aforesaid interviews. (Plaintiffs' Exhibit 2.)[4] Preliminary proceedings were held before the Commission and the Local raised the issues of federal preemption presented here. The Commission refused to consider those preemption arguments and entered a decision and order providing for further Commission proceedings. J.S. App. 7a.

4. The Proceedings in This Case.

In response to the Casino Control Commission's decision and order, Local 54 and Mr. Gerace filed a complaint in the United States District Court for the District of New Jersey alleging, *inter alia*, that § 93 of the Casino Control Act is preempted by the National Labor Relations Act, as amended ("NLRA"), and by the Employee Retirement Income Security Act of 1974 ("ERISA"), and moved for a preliminary injunction. An agreement was reached whereby all state proceedings would be held in abeyance pending the District Court's ruling on that

[4] Mr. Lumio died of pernicious leukemia in June 1981.

motion. On March 22, 1982, the District Court denied the motion for preliminary relief as premature.

Plaintiffs appealed to the United States Court of Appeals for the Third Circuit. While that appeal was pending the Casino Control Commission proceedings continued and on September 28, 1982, the Commission issued a decision and order finding three officers and agents of Local 54—Frank Gerace, Frank Materio, and Karlos LaSane—to be disqualified under § 86 of the Casino Control Act.[5] The Commission, pursuant to § 93(b) of that Act, thereupon barred Local 54 from collecting dues from employees of casino hotels, effective October 12, 1982, unless said officers and agents resigned or were removed from their union positions. The Commission further reserved its determination of whether to bar the Union from participating in the administration of employee benefit funds.[6] On October 12, 1982, the Commission issued a supplemental opinion holding that the additional prohibition in § 93(b) against the administration of pension and welfare funds by disqualified persons may be applied singly, or jointly with the bar on the collection of dues, at the Commission's discretion, and that the Commission would invoke additional sanctions if necessary.

On June 6, 1983, the Third Circuit held that § 93 of the Casino Control Act is preempted by the NLRA and by ERISA. J.S. App. 16a-33a. Accordingly, the Court declined to pass on plaintiffs' overbreadth and vagueness challenges to the Casino Control Act. *Id.* 37a.

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[5] As a result of Mr. Lumio's death, the issues concerning him were mooted and not litigated. Subsequent to the commencement of the Commission proceedings, the Division of Gaming Enforcement filed a second letter of complaint contesting the registrations of business agents, Karlos LaSane and Eli Kirkland. Kirkland was found not to be disqualified.

[6] As a result of the Commission's decision, on October 1, 1982, Appellees herein filed with the District Court a Motion for Injunctive Relief pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. The motion was granted on that date.

SUMMARY OF ARGUMENT

I. This is not a proper case for dismissal under *Younger v. Harris*, 401 U.S. 37. New Jersey's Attorney General stresses "the overwhelming importance of final resolution by this Court of the merits of the preemption issue." Dep't. Br. 14 n.6. Moreover, plaintiffs were not granted the "opportunity to raise and have timely decided by competent tribunal the federal issues involved," *Gibson v. Berryhill*, 411 U.S. 564, 577; the Commission's order would have gone into effect prior to such a determination but for the District Court's Rule 62(c) injunction.

II. A. (1) The Court of Appeals correctly decided that § 93 of the Casino Control Act is preempted insofar as it authorizes the Commission to disqualify bargaining representatives chosen by a union. *Hill v. Florida*, 325 U.S. 538, squarely held that the NLRA grants to the workers "full freedom of choice" in selecting their representative. "Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualification." 325 U.S. at 541. See also *id.* at 545 (Stone, C.J. concurring).

(2) *Hill* held also "that while a State may require a union to register, it may not, as a sanction for noncompliance, enjoin the union from functioning as such." *Id.* at 543. Under this reasoning, New Jersey's sanction for noncompliance with § 93—a prohibition against collecting dues from casino employees—is independently preempted because it is "inconsistent with" the employees' § 7 rights and "the federally protected process of collective bargaining." *Id.* The § 7 right to "assist labor organizations" surely encompasses the right to finance them. Moreover, the 1947 "Congress recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accom-

plish by collective bargaining will refuse to pay their share of the cost.'" *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416. New Jersey converts casino employees into involuntary free riders and compels the other members of Local 54 to pay all the union's expenses for collective bargaining or to relinquish their § 7 right to join with the casino employees in a single union.

B. Contrary to appellants, the authority of *Hill* is not diminished by *De Veau v. Braisted*, 363 U.S. 144, which rejected a preemption challenge to § 8 of the New York Waterfront Commission Act of 1953. *De Veau* rested on Congress' approval of the New York-New Jersey waterfront compact, and *Hill* was distinguished on that basis. *Id.* at 153-155 (plurality opinion); *id.* at 160-161 (Brennan, J. concurring).

C. *Bus Employees v. Wisconsin Board*, 340 U.S. 383, held that the NLRA preempts a State law which forbade any group of employees of a public utility from going out on strike, because it is contrary to § 7, which guarantees the right to strike. The law was not saved by the fact that it covered only the highly sensitive public utilities. "Creation of a special classification for public utilities is for Congress, not for this Court." *Id.* at 392-393. Compare § 8(e), (f) and (g) which treat specially with the industries designated therein. *Wisconsin Board* refutes appellants' principal point—that *Hill* is distinguishable because the Casino Control Act applies only to a single industry. In *Wisconsin Board* the Court also relied on the 1947 Congress' ratification of this Court's NLRA preemption decisions. The 1947 legislative history reveals that Congress was aware of *Hill*, and left it undisturbed while enacting a special anti-preemption provision (§ 14(b)) to authorize the States to outlaw union security clauses.

Appellants argue "that the NLRA should not preempt the Casino Control Act because crime control is a

"deeply rooted state interest" and thus subject to an exception to NLRA preemption. Appellants fail to heed that, as recognized in *Belknap v. Hale*, 51 L.W. 5079, 5081, this exception, which originated in *San Diego Unions v. Garmon*, 359 U.S. 236, 243-244, is applicable only to the *Garmon* branch of preemption doctrine, which is based on "*potential*" conflict with NLRA policy. *Id.* at 244. The exception has not been recognized in the substantive supercession branch of the doctrine, exemplified by *Wisconsin Board* and *Hill*, which preempts on the basis of *actual* conflict.

III. Insofar as it prohibits labor organizations to "administer any pension or welfare funds, if any officer * * * is disqualified in accordance with * * * Section 86," § 93(b) is preempted by ERISA. Section 514(a) of ERISA provides (with exceptions not claimed to be pertinent) that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. "Congress used the words 'relate to' in § 514(a) in their broad sense." *Shaw v. Delta Air Lines, Inc.*, 51 L.W. 4968, 4971. As the court below correctly ruled, "§ 93(b) cannot seriously be said not to relate to any employee benefit plan."

ARGUMENT

I. THIS IS NOT AN APPROPRIATE CASE FOR ABSTENTION UNDER *YOUNGER v. HARRIS*.

A. In this Court the Casino Control Commission urges reversal of the unanimous conclusion of the lower courts that the complaint herein should not be dismissed under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37. However, the Department of Law and Public Safety, in a brief signed by the Attorney General of New Jersey states that the appellants in No. 83-498 "do not press [the *Younger* defense] before this Court (a) because of

the overwhelming importance of final resolution by this Court of the merits of the preemption issue to New Jersey's ongoing regulation of casino activity; and (b) because we recognize that even had the lower federal courts exercised their discretion to abstain in favor of a preliminary determination of the substantive issue by the state courts, this Court would nonetheless remain the final arbiter." Dep't. Br. 14 n.6.[7] Under these circumstances, this Court's reasoning in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 is very much in point:

> *Younger* [and its progeny] express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "set its own house in order" when the federal issue is already before a state tribunal.
>
> It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances *Younger* principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks. [431 U.S. at 479-480.]

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[7] The Department also says that if the Court "determine[s] to address the abstention issue, we urge that the position of appellant Casino Control Commission be adopted but not, of course, at the expense of leaving the question of preemption raised in this case unresolved." Dep't. Br. 14 n. 6. These two alternatives are, of course, mutually inconsistent, because if the Court were to direct abstention, in agreement with the Commission, there would be no opportunity to reach the merits of the preemption issue.

Here the State of New Jersey, speaking through its chief law enforcement officer, has stated unequivocally that the State seeks an "immediate adjudication" of the preemption issue by this Court. The Casino Commission has no interest in delaying that adjudication because its proceedings have been completed and therefore will not be interfered with by a decision here. Accordingly, we submit that as in *Hodory* "the *Younger* principles of equity and comity do not require this Court" to withhold a decision on the merits.

B. If the *Younger* issue is nonetheless reached, the Court of Appeals' conclusion that the District Court did not commit an abuse of discretion in refusing to abstain should be affirmed. We adopt the reasoning of the majority and partially concurring opinions in the court below (J.S. App. 35a-37a; 40a-42a n.3). We add only the following, which is, we submit, dispositive.

In *Gibson v. Berryhill*, 411 U.S. 564, 577, the Court declared that because *Younger* "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts, [this] course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." See also *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 437 (opinion of the Court), 438 (concurring opinion). The Casino Commission, while acknowledging this "prerequisite for a *Younger* dismissal," errs in stating that "Local 54 clearly has an adequate state forum in which to raise its federal issues." Comm'n. Br. 18.

The Commission's Order of September 28, 1982 directed that three named individuals "be removed as officers, agents or principal employees of [Local 54] by October 12, 1982" and that if any of these individuals "is an officer, agent or principal employee of Local 54 as of October 12, 1982, Local 54 will hereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and employed by

a casino licensee or its agent." (J.S. App. 206a-207a.) This Order was entered after the Commission had refused to consider Local 54's federal claims (*id.* 7a), and of course the Commission's Order had not yet been reviewed by the state courts. As the Court of Appeals said, "Except for [the federal District Court's] injunction the Union would now be prohibited from collecting dues from its casino hotel members unless it replaced its President, its Business Agent, and a member of its Executive Board." (*Id.* 12a.) As that court also said:

> Had the order gone into effect, the Union would either have been deprived of the financial wherewithall to carry on its collective bargaining responsibilities or have deposed those duly elected officers whom the membership selected as their collective bargaining representatives. In neither case would it be possible, long after the event, to measure in money and compensate for the harm to the ongoing collective bargaining relationship from intangibles such as erosion of member's confidence in their chosen collective bargaining organization, delay in the process of grievances, or disruption of internal union affairs. [J.S. App. 33a-34a.]

Since this irreparable harm (which led the District Court to grant an injunction under F.R.Civ.P. Rule 62 (c)) would be suffered by appellees prior to obtaining a final resolution of their federal claims, even in the state forums, the state remedy is inadequate, and *Younger* abstention is inappropriate.

II. THE UNION OFFICIAL DISQUALIFICATION PROVISIONS OF NEW JERSEY LAW ARE PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The Court of Appeals held:

> Section 93 of the Casino Control Act is preempted by section 7 of the NLRA insofar as it purports to confer on the Commission authority to disqualify as bargaining representative the duly elected or selected

officials of a union certified by the Board as exclusive bargaining agent. [J.S. App. 31a.]

That court so held on the authority of *Hill v. Florida*, 325 U.S. 538, reasoning that *Hill* had decided that the National Labor Relations Act, as amended ("NLRA"), grants employees free choice concerning what individuals and what unions shall be their representative for purposes of collective bargaining and that no State may interfere with that federal right. We now show that the Court of Appeals correctly so held.

A. On the Authority of *Hill v. Florida*, the NLRA Preempts § 93 of the Casino Control Act.

1. (a) In 1943 Florida passed a statute providing for the licensing of union business agents and prohibiting the licensing of persons who had not been citizens for more than ten years, who had been convicted of a felony, or who were not of good moral character. At the instance of the Attorney General of Florida, that State's courts enjoined a union and a business agent from functioning as such until licenses under the statute were obtained. In *Hill*, this Court reversed. Because we submit, in agreement with the Court of Appeals, that this decision is "controlling" (J.S. App. 20a), we set forth at some length Justice Black's reasoning on behalf of the Court:

> It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. ***Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their***

guide. "Full freedom" to choose an agent means freedom to pass upon that agent's qualifications.

Section 4 of the Florida Act circumscribes the "full freedom" of choice which Congress said employees should possess. It does this by requiring a "business agent" to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that § 4 limits a union's choice of such an "agent" or bargaining representative, it substitutes Florida's judgment for the workers' judgment.

Thus, the "full freedom" of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that § 4 as applied here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605.

* * * *

Section 6, as here applied, stands no better. The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But, for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. *Cf. Western Union Co.* v. *Massachusetts*, 125 U.S. 530, 553, 554; *Kansas City Southern R. Co.* v. *Kaw Valley Drainage District*, 233 U.S. 75, 78; *St. Louis S.W. R. Co.* v. *Arkansas*, 235 U.S. 350, 368. This

> is true because if the union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of court and to conviction under the misdemeanor section of the act. Such an obstacle to collective bargaining cannot be created consistently with the Federal Act. [325 U.S. at 541-543, emphasis added.]

In sum, the Court held that the Florida statute was repugnant to the NLRA in that the State law: 1) imposed limitations on who may act as a union business agent; and 2) disqualified the union from acting as a collective bargaining representative for not registering in compliance with the Florida statute.

Chief Justice Stone, in a separate opinion, concurred with the first of these holdings:

> [T]he National Labor Relations Act does not preclude a state from requiring a labor union, or its officers and agents, as such, to procure licenses or make reports or perform other duties which do not materially obstruct the exercise of rights conferred by the National Labor Relations Act or other federal legislation. * * * But it is quite another matter to say that a state may fix standards or qualifications for labor unions and their officers and agents which would preclude any of them from being chosen and from functioning as bargaining agents under § 7 of the National Labor Relations Act. The right conferred on employees to bargain collectively through a representative of their own choosing is the foundation of the National Labor Relations Act. Without that right, or if it were restricted by state action, the Act as drawn would have little scope for operation. [325 U.S. at 545.]

As the Court of Appeals recognized, "what New Jersey has done in Section 93" is "precisely" what Chief Justice Stone said a state may not do, consistent with § 7 of the NLRA: The State has "fix[ed] standards or qualifications for labor unions and their officers and agents which

would preclude any of them from being chosen and from functioning as bargaining agents under § 7 of the National Labor Relations Act." (J.S. App. 20a.)

(b) It bears noting that, contrary to appellants' depiction of their statute as disqualifying only those guilty of "criminal or *quasi*-criminal conduct," (Dep't. Br. 37), the statute in fact sweeps very broadly, and ambiguously, and will impact upon the rights protected by § 7 in a very obtrusive way. The litany of grounds for disqualification appearing in 5:12-86 would empower the Casino Control Commission to disqualify virtually anyone whose past conduct signified to the Commission a propensity to act inconsistently with the "policy of the Act," and the paramount policy of the Act is to promote tourism and thereby generate additional economic revenues for the state's citizens (5:12-1(b)(1), (2), (3), (4)). Since many activities protected by § 7 of the NLRA are inconsistent with the promotion of tourism (e.g. economic strikes that close hotels and casinos), the Act vests the Commission with power to disqualify virtually any union officer whose militancy is seen as a threat to tourism; the broad language of § 86 would render virtually every such officer vulnerable to a finding of disqualification.[8] And, of course, employers can be expected to take ad-

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[8] As shown at p. 3, *supra*, § 86(b) lists, as a ground for disqualification, noncooperations with the Commission; disqualification of two union officials was sought in this case because, although they had expressly indicated their willingness to answer all the Commission's questions, they had insisted upon the presence of their counsel, p. 7, *supra*.

Under the broad definition of "career offender" in § 86(f) (see p. 3 n.2, *supra*), a union official who has never in his life committed a wrong could be disqualified for numbering among his friends a person who has never even been charged, let alone convicted of committing a wrong, but is found by the Commission to be a "person whose behavior is pursued * * * for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State," and if the Commission arrives at a "reasonable belief" that the friendship is "inimical to * * * gaming operations."

vantage of the jeopardy thus posed to union officers, to obtain leverage against those who threaten to vigorously champion the interests of the employees they represent.

Congress, in enacting the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") specifically found on the basis of actual experience that disabling unions from performing their representational functions out of disapproval of the character of their officers is unsound.[9] Consequently, although § 504(a) of the LMRDA disqualified individuals who had been convicted of certain offenses from office and employment in labor organizations (and likewise disqualified members of the Communist party), these prohibitions were enforceable exclusively by criminal sanctions against the disqualified individuals. So too, the filing requirements established in §§ 201(a) and (b) were made enforceable by the criminal and civil sanctions of §§ 209 and 210, and §§ 9(f), (g) and (h) of the NLRA, which deprived noncomplying unions of the services of the NLRB, were *repealed* by § 201(d).

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[9] See Sen. Rep. No. 187 on S.1555, 80th Cong., 1st Sess. (1959) p. 9:

> To deny a union access to the National Labor Relations Board because its officers did not file a proper report is unwise for four reasons. First, it would be ineffective in the case of strong unions not dependent upon NLRB facilities; second, it is unfair to the members who have done no wrong but who would suffer both the denial of information and the loss of NLRB protection; third, the rights and duties created by the National Labor Relations Act exist for the benefit of the public, and such legal obligations should be enforced equally in all cases, not traded off against one another as a system of rewards and punishments; and, finally, experience with a similar provision in the present law clearly demonstrates that conditioning the use of the NLRB processes on compliance with not wholly related requirements such as this can result in a frustration of the principal purpose of the Labor Management Relations Act, that is, settlement of labor disputes in an orderly, efficient, and expeditious manner. In short, the committee is convinced that such a procedure is costly, cumbersome, and of doubtful efficacy.

That the 1959 Congress determined that disqualification is an improper sanction is the exact point decided in *Alto Plastics Mfg. Corp.*, 136 NLRB 850:

> In titles I through VI of the Labor-Management Reporting and Disclosure Act of 1959, Congress expressly dealt with [internal union affairs.] It is particularly significant that the remedies provided in the LMRDA were given to individual employees directly, and to the public through the intervention of the Secretary of Labor or the Department of Justice. The theory underlying this type of remedial legislation is not to "illegalize" the organization itself, but to afford protection to all parties concerned by creating specific Federal rights and remedies whereby the activities of the organization and its officers and agents are regulated and subjected to judicial review in the vindication of those rights. Had Congress desired to strike directly at the organization itself, Congress would have said so. [136 NLRB at 853.][10]

The New Jersey statute, by making the union and its members suffer because of the State's disapproval of the union's officers, flies directly in the face of the national labor policy enunciated by Congress.

2. The second holding of *Hill*, which is buttressed, as we have just shown, by Congress' action in 1959, was that while a State may require a union to register, it may not, as a sanction for noncompliance, enjoin the union from functioning as such. That sanction, the Court held, is "inconsistent with the federally protected process of collective bargaining." 325 U.S. at 543. Under the same reasoning, the sanction proposed by § 93 of the Casino

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[10] *Alto Plastics* is correctly cited at Dep't. Br. 41 for the proposition that "[W]hat Section 93 does seek to accomplish, the removal of disqualified labor union officials, involves an area extraneous to the regulatory concerns of the Board." Since the State law is preempted here because that law is incompatible with the substantive protection of federal law and not because of any threat to the NLRB's primary jurisdiction, appellants gain nothing from that proposition.

Control Act against a union if an officer, agent or principal employee is disqualified under § 86, is also preempted by the NLRA. Section 7 declares the rights of employees, *inter alia*, to "form, join or assist labor organizations." The right to "assist" surely encompasses the right to finance such organizations. So too, by forbidding casino employes to pay dues to such a labor organization, New Jersey would forbid these employees from exercising their right to join, unless the union chose to waive that basic requirement, assuming that the union constitution even permitted such a waiver. Moreover:

> * * * Congress' decision to allow union-security agreements * * * reflects its concern, that at least as a matter of federal law, the parties to a collective-bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them. Again, the focus of this concern is *not* the hiring process, but rather the benefits to be derived from union representation during the period of employment—while the employee is on the job. Thus, the Senate Committee Report on what became the Taft-Hartley Act observed that § 8(a)(3) gives "employers and unions who feel that [union-security] agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." S. Rep. No. 105, 80th Cong., 1st Sess., 7 (1947). 1 Leg. Hist. 413. "Congress recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.' S. Rep. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. L.M.R.A. 412." *NLRB* v. *General Motors Corp.*, [373 U.S. 734] at 740-741. [*Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416, emphasis in original.]

By prohibiting employees of casino hotels from paying dues to a union which retains a disqualified officer or agent, the Act converts these individuals into involuntary free riders. Conversely, it compels those members of Lo-

cal 54 who are not employed by casinos (about 15% of the members, see p. 23 n.11, *infra*) to pay for all the representation and other expenses of the union or relinquish their § 7 right to join with the casino hotel employees in a single union for collective bargaining. Section 14(b) of the NLRA, which authorizes the States to forbid agreements that require the payment of union dues, most assuredly does not authorize the states to make *nonpayment* compulsory. On the contrary, the § 8(a)(3) proviso and § 14(b) represent a thoroughly considered compromise between the financial needs of unions and employees' freedom of choice, with the States being afforded the authority to prefer the latter interest. New Jersey's anti-dues sanction, however, undermines both of the values which Congress balanced and is therefore wholly inconsistent with the NLRA.

One of the appellants' briefs asserts "that a sanction for failure to file which directly prohibits a union from engaging in collective bargaining will be precluded by the operation of federal law, *Hill*, *supra*, 325 U.S. at 543, but that a penalty such as a ban on dues collection will not be so excluded. [*Alabama State Federation of Labor v.*] *McAdory*, 325 U.S. [450] at 466." Dep't. Br. 34. The passage from *McAdory* on which appellants rely does not state that "a ban on dues collection" will be permissible even if this would seriously undermine the union's functioning as a bargaining representative of employees covered by the NLRA. And it should be sufficient to dispel appellants' reading of *McAdory* that when this same sanction was challenged in *DeVeau v. Braisted*, 363 U.S. 144, Justice Frankfurter's plurality opinion distinguished *Hill* on other grounds (see p. 25 to 26, *infra*), but did not so much as hint that *McAdory* had decided the point. "Reading *Hill* and *McAdory* together" (Dep't. Br. 34) as appellants would, attributes to Congress the self-defeating intention of allowing a state to do by indirection that which *Hill* held it may not do directly. To be sure, in the passage quoted by appellants the Court

said, "we cannot *assume* that the failure to file reports will result in the exclusion of petitioners, or any of them, from functioning in the state, or visit any consequences upon them other than the penalty for failure to file." 325 U.S. at 466 (emphasis added). But those very words show that the *McAdory* Court did not pass on the legality of a ban in a case such as that here where such a showing is made, since in the immediately succeeding sentence the Court carefully reserved the "question * * * of a statute which has been construed to operate either by its penal sanctions, or by the aid of injunction to prevent petitioners, or any of them, from functioning within the state for non-compliance with § 7." *Id.* In contrast with *McAdory*, the present record contains abundant uncontradicted evidence that Local 54 could not perform its functions as bargaining representative without collecting dues from casino hotel employees.[11] For example, griev-

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[11] Anna Mary Bitmire, Local 54's office manager, swore in an affidavit submitted in the District Court:

> The total monthly budget for the operation of all of Local 54's services including the required per capita payment to the International Union [$33,000] is approximately $120,000 a month. The sole income received by Local 54 comes from union dues and initiation fees, in which the total amount, consisting primarily of dues, is approximately $130,000 a month, of which approximately 85% comes from the membership dues paid by members employed in the casino hotels.
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> * * * *
>
> In the event of a cessation of dues income to Local 54 from the hotel casinos, it will be impossible to maintain the union hall, to service the union membership either in the casino hotels or in the non casino hotel areas, and as a result the collective bargaining agreements will not be enforceable. The monies and income of Local 54 are extended solely for the salaries and benefits payable to those persons who provide the services to the membership, and to all of the expenses necessary in order to administer collective bargaining agreements, bargain for new collective bargaining agreements, organize the unorganized, process grievances, and perform the other responsibilities of a collective bargaining agent. [Appendix for Appellants in the Court of Appeals 318a-319a.]

ance adjustment, a major union function in "the federally protected process of collective bargaining" (*Hill*, 325 U.S. at 543) could not be conducted by Local 54 without the receipt of dues.[12]

B. *Hill v. Florida* Is the Governing Precedent Herein.

Appellants contend that the authority of *Hill* has been eroded by this Court's subsequent decision in *DeVeau v. Braisted*, 363 U.S. 144 ("*DeVeau*"), and by subsequent Congressional action. We now show that the Court of Appeals correctly rejected this contention because *DeVeau* rests on Congress' authorization of the Waterfront Commission Compact.

1. We adopt the Court of Appeals' description and analysis of *DeVeau*:

> *DeVeau* involved a challenge on preemption grounds to the constitutionality of section 8 of the New York Waterfront Commission Act of 1953, which disqualified from office in any waterfront labor organization convicted felons who had not been pardoned. The New York legislation and companion legislation in New Jersey were adopted pursuant to an

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[12] Carolyn M. Bishop, a grievance hearing coordinator for Local 54, swore in an affidavit submitted in the District Court:

> Deponent and her co-employee, Mary Anne Garrity, as well as all of the business agents and all of the officers and other representatives who perform the services of the grievance procedure are full time employees of the union who depend upon wages and fringe benefits for their daily livelihoods which wages and fringe benefits are derived solely from the union dues paid by members to Local 54. In addition, the costs of the impartial arbitrators, the costs of the attorneys required to represent the union in the grievance and arbitration procedure and all related costs are borne solely by the union treasury, which is made up completely of income derived through the payment of union dues. In the event of a cessation of dues income, there would be no means to continue the representation as aforementioned, and there would be a denial to thousands of employees of protection against unjust discharge, los[s] of seniority rights, fringe benefits, employment opportunities, and the other rights secured by the contract. [*Id.* at 243a.]

interstate compact between those states. The compact was submitted to Congress, as required by article I, section 10 of the Constitution, and after hearings in both the House and Senate was approved. Nevertheless a disqualified union officer contended that the state statute was preempted by sections 1 and 7 of the NLRA. Justice Frankfurter rejected that contention, observing:

> In light of the purpose, scope and background of this New York legislation and Congress' relation to it, such an inference of incompatibility has no foundation. In this case we need not imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation. Here the States presented their legislative program to cope with an urgent local problem to the Congress, and the Congress unambiguously supported what is the core of this reform. Had § 3 [of the New York law] been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption.

363 U.S. at 153. He also rejected the contention that the enactment of the LMRDA, subsequent to congressional approval of the compact, vitiated prior approval. Frankfurter's opinion did not command a majority, but even in speaking for himself and the three justices who joined in it he was careful not to intimate that *Hill* v. *Florida* was overruled. The absence of any such suggestion is significant since Frankfurter had dissented in *Hill* v. *Florida*, 325 U.S. at 547. Obviously he was unable in *DeVeau* to find support for the adoption of his dissenting position. Justice Brennan, whose separate brief opinion was critical for the judgment, made it clear that he relied on congressional intent in approving the compact. 363 U.S. at 162. The dissenting justices, who noted that the justices in the majority were not overruling *Hill* v. *Florida*, disagreed only about the proper construction of the compact. 363 U.S. at 161,

163. (Douglas, J., dissenting). The *DeVeau* case cannot, therefore, be read as impairing the authority of *Hill* v. *Florida*. [J.S. App. 28a-29a.]

2. Appellants point to language in Justice Frankfurter's opinion in *DeVeau* which, in its approach to the question of preemption is reminiscent of his dissents in *Hill* and in *Bus Employees v. Wisconsin Board*, 340 U.S. 383. But this language did not commend itself to a majority of the Court and does not appear to have been a necessary part of the plurality's analysis. For the plurality opinion, and Justice Brennan's concurring statement, both belie the assertion of one of the appellants that "*DeVeau* did not pivot on the existence of the compact." Comm'n. Br. 33. Immediately after the passage quoted by the Court of Appeals, the *DeVeau* plurality opinion devoted two additional paragraphs to Congress' consideration of the compact (363 U.S. at 153-154), and then concluded its discussion of the NLRA-preemption issue by distinguishing *Hill* precisely on the basis of Congress' approval of § 8 of the New York Waterfront Commission Act:

> The sum of these considerations is that it would offend reason to attribute to Congress a purpose to pre-empt the state regulation contained in § 8. The decision in *Hill* v. *Florida*, 325 U.S. 538, in no wise obstructs this conclusion. An element most persuasive here, congressional approval of the heart of the state legislative program explicitly brought to its attention, was not present in that case. Nor was it true of *Hill* v. *Florida*, as it is here, that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry. [363 U.S. at 154-155.]

And Justice Brennan, in providing the fifth vote for affirmance, stated his "opinion that Congress has demonstrated its intent that § 8 of the New York Waterfront

Commission Act should stand despite the provisions of the National Labor Relations Act." 363 U.S. at 160.[13]

3. In *DeVeau* it was contended also that § 8 of the Waterfront Commission Act was preempted by § 504(a) of the LMRDA, which prohibits persons who have been convicted of the crimes defined therein from holding union office. The Court rejected that contention, and we entirely agree, that "Section 504 * * * does not preempt the states from establishing more stringent standards where justified by a compelling local interest." Dep't. Br. 24. Indeed, we think it is clear that § 504 does not so preempt, whether or not a compelling local interest is shown. But the Court of Appeals did not rely on any preemptive effect of the LMRDA; nor do we. It suffices that the Casino Control Act is preempted *by the NLRA* (and, with respect to the pension and welfare plan disqualification discussed in Point III, *infra*, by ERISA). In contesting an LMRDA preemption claim not advanced appellants demolish a straw man.

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[13] In asserting that Justice Brennan's conclusion that § 8 of the Waterfront Compact was not preempted by the NLRA did not rest on Congress' approval of the Compact, the Commission's brief not only ignores the above-quoted passage, which addressed that issue, but distorts by a critical omission the portion of his statement which that brief does quote. The second sentence of Justice Brennan's statement reads as follows: "He believes that New York's disqualification of ex-felons from waterfront union office, on all the circumstances, and as applied to this specific area, is a reasonable means for achieving a legitimate state aim, *and does not deny due process or otherwise violate the Federal Constitution.*" 363 U.S. at 161, emphasis added to show the portion elided from the quotation at Comm'n. Br. 33. It will be recalled that the appellants in *DeVeau* had argued that § 8 of the Compact violates the Due Process Clause of the Fourteenth Amendment and the constitutional prohibitions against Bills of Attainder and *ex post facto* laws. See 363 U.S. at 157-160 (plurality opinion).

The two lower court decisions cited at Dep't. Br. 46-47 for the proposition that the *DeVeau* analysis should be employed on the ERISA-preemption issue recognize that *DeVeau* was predicated on Congress' approval of the Compact. See the portions of those opinions quoted at pp. 48-49 nn.32-33, *infra*.

4. Before leaving *DeVeau*, it is worth noting the differences between the statute now before this Court and the compact in *DeVeau*. The statute here is of course far more sweeping in its application: the New York Waterfront Act banned only convicted felons (363 U.S. at 145) while, as noted *supra*, p. 3 and n.2, the New Jersey statute would disqualify broad categories of persons who have never committed a crime (let alone been charged with one), and without a finding that they are likely to do anything in the future more odious than behave inconsistently with the State's interest in promoting tourism. Of equal importance, the Waterfront Compact was adopted to address a demonstrated problem of entrenched corruption—a reality that was deemed critically important in this Court's opinion. New Jersey, by contrast, has enacted far more sweeping legislation without a demonstrated basis to fear evils attributable to unions. In this respect, the two reports to the New Jersey legislature that were the foundation of the statute are illuminating. Staff Policy Group on Casino Gambling, Second Interim Report (Feb. 17, 1977) [hereinafter "Staff Report"]; Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey (Apr. 1977) [hereinafter "Comm'n Report"]. On the basis of experience in other jurisdictions the reports were able to detail with great specificity the means for avoiding corruption attributable to the actions of casino owners, operators, employees and suppliers. (Staff Report at 1-3, 10-14, 21-28, 34-36; Comm'n Report Parts B, C, D, E, F and G.) But each report contained only a single paragraph *speculating* on the ways that unions might be a source of evil, and the particular dangers hypothesized do not rationally explain, let alone justify, the broad prohibitions that are the subject of this lawsuit.

(i) The Commission report declared (at p. 1-H): "[T]he ready source of cash which union coffers provide can be employed as a financing of all sorts of legitimate

or illegitimate ventures." There are, of course, myriad ways that the state could protect against this investment danger—even if the belief in the amplitude of "union coffers" were better founded—without crippling unions in the performance of their federally-protected representational functions; most obviously, the State could absolutely forbid the investment of any union monies in casino operations (compare § 5:12-93(c)). And the hypothesized danger simply has no nexus to the disqualification provisions at issue here. "Union coffers" would be as readily available for "financing . . . ventures" whether or not the unions are allowed to represent employees in casino hotels.

(ii) The only other rationale offered in the reports was that unions, if corruptly run, might use the threat of strikes to extort monies from casino operators. (Comm'n Report, p. 1-H; Staff Report, p. 46). That hypothesized danger, which would appear equally applicable to any industry, surely can be (and indeed is) guarded against by means less intrusive of federal interests. Extortion by union officials is already both a federal and state crime. Those against whom the extortion would be practiced—the casino hotel owners—are persons whose integrity must have been affirmatively established as a precondition to their securing operating licenses (§§ 80-88), and who therefore can be trusted to report (indeed, are obliged by the statute to report (§ 80(g)) any such attempt. Thus, even if there had been experience elsewhere to suggest a danger of attempted union extortion of casino operators (and none was cited in the reports), there are ample safeguards in New Jersey law to prevent that occurrence without crippling the bargaining representation function.[14] There is, in sum, nothing here

[14] It is also noteworthy that Nevada, which states at p. 9 of its brief *amicus* that it has had legalized controlled casino gambling since 1931, but did not regulate unions until 1979 (*id.* 16-17), recites no experience with the evils which the New Jersey reports fear.

that approximates the legislative record upon which the compact in *DeVeau* was founded.

C. *Bus Employees v. Wisconsin Board* Confirms the Preemptive Effect of the NLRA.

1. The heart of appellants' theory is that the challenged provisions of the Casino Control Act should be sustained because those provisions are limited to a single sensitive state industry—casino gambling. As the Court of Appeals recognized: "Essentially the same argument was rejected when as a reason for avoiding federal preemption, states asserted their deep interest in the operation of state franchised public utilities." (J.S. App. 30, citing *Bus Employees v. Wisconsin Board*, 340 U.S. 383 ("*Wisconsin Board*").)

In *Wisconsin Board*, this Court struck down the Wisconsin Public Utilities Anti-Strike Law which, *inter alia*, made it unlawful for any group of employees of a public utility employer to go out on strike. See *id.* at 387. Adverting to its decision, at the previous Term, in *Automobile Workers v. O'Brien*, 339 U.S. 454, the Court said:

> We noted [in *O'Brien*] that Congress in § 7 of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, expressly safeguarded for employees in such industries the "right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection, e.g., to strike." We also listed the qualifications and regulations which Congress itself has imposed upon its guarantee of the right to strike. * * * Upon review of these federal legislative provisions, we held, 339 U.S. at 457:
>
> > "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. *Plankington Packing Co. v. Wisconsin Board*, 338 U.S. 953 (1950); *LaCrosse Telephone Corp.*

> *v. Wisconsin Board*, 336 U.S. 18 (1949); *Bethlehem Steel Co. v. New York Labor Board*, 330 U.S. 767 (1947); *Hill v. Florida*, 325 U.S. 538 (1945)." [340 U.S. at 389-390, footnotes omitted.]

In reaching this result, the *Wisconsin Board* Court rejected the proffered distinction "that the industry to which Michigan applied its notice and strike-vote provisions [in *O'Brien*] was a national manufacturing organization rather than a local public utility." 340 U.S. at 391. The Court observed that Congress had regulated labor relations to the full extent of its constitutional power under the Commerce Clause, that public utilities are subject to the commerce power and that Congress had, in 1947, rejected separate treatment for public utilities. *Id.* at 391-392. "Creation of a special classification for public utilities is for Congress, not for this Court." *Id.* at 392-393.

In a dissenting opinion for three members of the Court, Justice Frankfurter recalled that public utilities had long been especially subject to regulation, in their labor relations and otherwise, and observed that, "stoppage in utility service so clearly involves the needs of a community as to evoke instinctively the power of government." 340 U.S. at 405. He thereupon urged that the

> Court should not ignore history and economic facts in construing federal legislation that comes within the area of interacting State and federal control. To derive from the general language of the federal act a "right" to strike in violation of a State law regulating public utilities is to strip from words the limits inherent in their context. [340 U.S. at 405.]

Despite these historic and economic considerations, not present herein, the Court refused to limit the rights guaranteed by the NLRA to employees of public utilities. *Wisconsin Board*'s holding applies with at least equal force to appellants' prayer for special treatment of New Jersey's casino gambling industry. When Congress wishes

to exclude an industry from the coverage of the NLRA, or to give an industry special treatment, the legislature knows how to do so. In 1947, Congress, for example, amended § 2(2) of the NLRA to exclude nonprofit hospitals from the definition of "employer"; the health care amendments of 1974 [15] eliminated that exclusion, but added § 8(g), which establishes a special 10-day notice requirement prior to any strike, picketing, or other concerted refusal to work at any "health care institution" (profit or nonprofit), as defined in a new § 2(14). So, too, under the 1959 amendments to the NLRA there are separate provisos to § 8(e) dealing respectively with the apparel and clothing and building and construction industries; the latter is also separately dealt with in § 8(f). Moreover, when *Wisconsin Board* was unanimously reaffirmed in *Bus Employees v. Missouri*, 374 U.S. 74, the Court observed: "It is hardly necessary to add that nothing we have said even remotely affects the rights of a State to own or operate a public utility or any other business * * *" (*id.* at 83). The availability of this choice was stressed by the Court of Appeals, which noted that "New Jersey has exercised that option with respect to its lottery." (J.S. App. 30a.) The Court of Appeals added:

> Congress has not, however, given the states the further option of deciding for themselves which areas of private enterprise can be so cloaked with the mantle of state interest as to be placed outside the preemptive scope of section 7 of the NLRA. The state argues that it should have that option at least for the gambling industry, because that industry is uniquely attractive to unwholesome elements in our society. Recognition of such a doctrine, however, could not be confined to the gambling industry. Other industries in which the state is vitally interested have also been identified as susceptible of infiltration by organized crime. The problem of organized crime is a national one, which Congress has

[15] Pub. L. 93-360, 88 Stat. 395.

> addressed both in criminal statutes, *e.g.*, 18 U.S.C. §§ 1961-1968 (1976 & Supp. IV 1980), and by permitting general state criminal law to operate against labor union officials. 29 U.S.C. § 524 (1976). That problem cannot be relied upon by the states to Balkanize the law with respect to choice of collective bargaining representatives in non-exempt interstate commerce. [J.S. App. 30a-31a, footnote omitted.]

Appellants cannot differentiate the present case from *Wisconsin Board*. Their briefs simply ignore that precedent, despite the Court of Appeals' strong reliance thereon in rejecting appellants' principal point—that *Hill* is distinguishable because the Casino Control Act applies only to a single industry.[16]

2. The *Wisconsin Board* decision relied in part on the 1947 Congress' ratification of the NLRA preemption principles which had been established by this Court:

> When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York Labor Board*, 330 U.S. 767 (1947), and, in its handling of the problems presented by that case. Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation "preempts the field that the act covers insofar as commerce within the meaning of the act is concerned" and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and de-

[16] The Department brief does not mention *Wisconsin Board* at all, and the Commission brief does so only in connection with the abstention issue. Comm'n. Br. 23.

> clare invalid state regulation which impinges on that legislation. [340 U.S. at 397-398, footnotes omitted.]

Likewise, in the present case the Court of Appeals has comprehensively demonstrated that Congress ratified the *Hill* decision in amending the NLRA in 1947 and 1959. See J.S. App. 21a to 27a, to which we respectfully call this Court's attention. We therefore add only two points to the Court of Appeals' discussion.

(a) In the passage from *Wisconsin Board* just set forth, this Court quoted the report of the House Committee on Education and Labor on what became § 14(b) of the NLRA as amended in 1947.[17] The Senate Committee Report on the parallel provision in the Senate bill states:

> Although these regulatory measures have not received authoritative interpretation by the Supreme Court (see *A.F. of L. v. Watson*, 327 U.S. 582), it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations in industries affecting commerce (*Hill v. Florida*, 325 U.S. 538; see also *Bethlehem Steel Co. v. N.Y. Labor Board*, decided by the Supreme Court April 7, 1947).[18]

Thus, Congress enacted § 14(b), an anti-preemption provision, in recognition of this Court's NLRA preemption decisions. Section 14(b), like § 10(a) (which, as *Wisconsin Board* noted, was enacted in response to the *Bethlehem Steel* decision) represents both Congress' acceptance of the general preemption rule, and Congress' modification of that rule with respect to those specific subjects where Congress has thought modification appropriate.[19]

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[17] 340 U.S. at 398 text and note at n. 24, citing H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) p. 44.

[18] Sen. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (1947) p. 6.

[19] The suggestion that the 1953 Congress in approving the Waterfront Compact determined that in general state laws providing for the removal of union officers do not interfere with rights under the NLRA as amended in 1947 (Comm'n. Br. 32), is even less plausible

(b) Appellants argue, too, that by enacting § 504(a) of the LMRDA of 1959, which prohibits persons convicted of certain crimes from holding union office, Congress tacitly approved state imposition of more stringent qualifications.[20] The opinion in *Wisconsin Board* shows

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than is usual when inferences as to the meaning of a federal law are sought to be drawn from the views of a post-enactment Congress. The Waterfront Compact is not *in pari materia* with the NLRA. Indeed, the legislation approving the Compact was considered by the Senate Committee on Interstate and Foreign Commerce and by the House Judiciary Committee, neither of which is responsible for labor legislation. Finally, the provision of the Compact which disclaims interference with any rights under federal law, like all others, was drafted by the contracting states, and in accord with normal procedures was considered as a whole that Congress would approve or disapprove as submitted. See Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st Sess., on H.R. 6286 *et al.*, p. 156. Neither the committee reports nor the debates refer to this provision, let alone contain any statement that the disqualification of persons from union office does not interfere with employees' § 7 rights.

[20] In *DeVeau* both the plurality opinion and Justice Brennan's concurring statement relied on anti-preemption provisions in the LMRDA which have no counterpart in the NLRA. See 363 U.S. at 156-157, 160-161. In rejecting the contention that § 504(a) "impliedly barred" any different state disablement provision, Justice Frankfurter, for the *DeVeau* plurality, pointed to "the 1959 Act [LMRDA] which reflects congressional awareness of the problems of preemption in the area of labor legislation, and which did not leave the solution of questions of preemption to inference" (363 U.S. at 156), and contrasted § 504(a) with other provisions of the LMRDA which expressly exclude the operation of state law. Justice Frankfurter cited two sections of that 1959 Act "[which] affirmatively preserve the operation of state law". *Id.* The provisions thus referred to, §§ 603(a) and 604, each provide that "nothing in this Act" shall have a preemptive effect. The more important of these, § 603(a), is, as Justice Frankfurter wrote, "an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided in the 1959 Act." 363 U.S. at 157. That section provides,

> Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor

that this inference from the enactment of § 504 is entirely unwarranted.

The supporters of the Wisconsin statute argued, and the dissenting opinion agreed, that the limitations on national emergency strikes in Title II of the 1947 Act demonstrate that "the principle of hands-off collective bargaining is no more absolute than the right to strike" and "imply that the States retain the power to protect the public interest in emergencies economically and practically confined within a State." 340 U.S. at 405, 407. The Court, however, squarely held to the contrary.

> In any event congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. *Automobile Workers* v. *O'Brien*, *supra*, at 457. And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the

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organization or any officer, agent, shop steward, or other representative of a labor organization * * * under the laws of any State * * *.

Justice Brennan, in turn, concurred in this portion of *DeVeau* on the basis "that the Labor-Management Reporting and Disclosure Act of 1959 explicitly provides that it shall not displace such legislation of the States." 363 U.S. at 160-161.

As the foregoing portions of *DeVeau* make clear, while § 504(a) of the LMRDA does not, of its own force, expressly or impliedly preempt any state law, that section also does *not*, expressly or impliedly, authorize any State law which is preempted by some *other* federal law. Indeed, as the Court of Appeals explained, the entire LMRDA, which included amendments to the NLRA, reflects approval of this Court's NLRA-preemption decisions, with a single exception not pertinent here—the enactment of § 14(c) of the NLRA, which significantly modifies *Guss v. Utah Labor Board*, 353 U.S. 1.

state legislation is in conflict with federal law. [340 U.S. at 394.] [21]

3. Appellants also argue that the NLRA should not preempt the Casino Control Act because crime control—the object of the provisions here at issue—is a "deeply rooted state interest" and thus subject to an exception to NLRA preemption doctrine. Dep't. Br. 15-18; Comm'n. Br. 35-

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[21] In *Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, the Court again considered and rejected an anti-preemption argument similar to that based on § 504(a) that appellants make here. The question there was whether §§ 7 and 13 of the NLRA precluded a state from enjoining recognition picketing by a union which was not eligible for Board certification because of noncompliance with the filing requirements of §§ 9(f), (g) and (h) of the NLRA as it then stood. In a lone dissenting opinion, Justice Frankfurter argued against preemption. In his view, the fact that Congress had denied an important benefit to a noncomplying union rendered it unlikely that "Congress had impliedly withdrawn from the States the power to regulate such a union." 351 U.S. at 78. He added:

> So far as its own law-enforcement machinery for protecting the interests of employees is concerned, Congress designed to hamper non-conforming unions and to discriminate against them by denying them rights deemed of the utmost importance to trade unions. This being so, I find it rather difficult to conclude that, while visiting such consequences upon a non-conforming union in the federal domain of law enforcement, the Congress has impliedly withdrawn from the States the power to regulate such a union. [351 U.S. at 78.]

This reasoning parallels the present appellants' argument that because Congress has, in § 504(a) of the LMRDA, outlawed persons convicted of certain crimes from holding union office, Congress impliedly approved a similar (although more stringent) regulation by the States.

The Court, however, *rejected* this approach and held that the union's right under §§ 7 and 13 to engage in peaceful picketing and to strike was not lost because of its noncompliance:

> Subsections (f), (g) and (h) of § 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance. [351 U.S. at 73.]

37. This argument rests entirely on a failure to heed the distinction in preemption analysis Justice Harlan explained with characteristic precision:

> For example, in referring to decisions holding state laws preempted by the NLRA care must be taken to distinguish preemption based on federal protection of the conduct in question; *e.g., Teamsters v. Oliver*, 358 U.S. 283 (1959); *Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951) from that based predominantly on the primary jurisdiction of the National Labor Relations Board, *e.g., San Diego Union v. Garmon*, 359 U.S. 236 (1959), although the two are often not easily separable. [*Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 n.19 (*"Trainmen"*).]

In the first of these categories—substantive supercession—this Court has never balanced the federal and state interests. Rather, the "deeply rooted state interest" exception to preemption originated in *San Diego Union v. Garmon*, 359 U.S. 236, 243-244, and has been followed exclusively in the second branch of the preemption doctrine identified by Justice Harlan in *Trainmen*. Last Term's decision in *Belknap v. Hale*, —— U.S. ——, 51 L.W. 5079, makes this clear:

> Our cases have announced two doctrines for determining whether state regulations or causes of action are preempted by the NLRA. Under the first, set out in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. *Id.*, at 245. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. *Id.*, at 243-244, *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 200 (1978), *Farmer v. Carpenters*, 430 U.S. 290, 296-297 (1977). In such cases, the state's interest in con-

> trolling or remedying the effects of the conduct is balanced against both the interference with the Board's ability to adjudicate controversies committed to it by the Act, *Farmer v. Carpenters, supra*, at 297, *Sears, Roebuck & Co. v. Carpenters, supra*, 436 U.S. at 200, and the risk that the state will sanction conduct that the Act protects. *Id.*, at 205. The second preemption doctrine, set out it *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated, *id.*, at 140, conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes, *id.*, at 147-148. [51 L.W. at 5081.] [22]

Indeed, *Belknap* applied the "deeply rooted state interest" test only in the *Garmon* portion of the opinion, see p. 40 n.23, *infra*, and each of the cases appellants cite on this point is in the *Garmon* line.

By contrast, the present case involves the first of Justice Harlan's categories—"pre-emption based on federal protection of the conduct in question." *Hill* was decided long before *Garmon*, said nothing about the primary jurisdiction of the NLRB, and rests squarely on the proposition that the states may not interfere with the employees' right, protected by the NLRA, to select their bargaining representatives. See Part IIA, *supra*. In this category of cases, where it is asserted that a State has interfered with the exercise of rights granted by the NLRA, this Court has not inquired as to the importance to the state of its challenged law.

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[22] *Belknap* and *Machinists v. Wisc. Emp. Rel. Comm'n.*, 427 U.S. 132, 138-141 (which recognized the same distinction between the two NLRA preemption doctrines discussed in the text), address only one important class of substantive supercession cases—those which involve the use of economic weapons by parties in a labor dispute, the immediate context of *Belknap* and *Machinists*. But this does not bespeak disagreement with the more general *Trainmen* analysis, which was quoted approvingly in *Machinists*, 427 U.S. at 138.

Here again, *Wisconsin Board* is directly in point: In striking down the Wisconsin Public Utility Anti-Strike Law, the Court expressly rejected the arguments of that State and others, which "stress[ed] the importance of gas and transit service to the local community and urge[d] that predominantly local problems are best left to local governmental authority for solution." 340 U.S. at 397. Noting the contrary view that federal regulation is desirable, the Court responded:

> The very nature of the debatable policy questions raised by these contentions convinces us that they cannot properly be resolved by the Court. In our view, these questions are for legislative determination and have been resolved by Congress adversely to respondents. [*Id.*]

Likewise, *Bus Employees v. Missouri*, 374 U.S. 74, a post-*Garmon* decision, struck down a similar state statute because "Missouri has forbidden the exercise of rights explicitly protected by § 7 of the Act"; that being so, the Court did not deem it relevant to inquire whether that statute was "deeply rooted in state interests." [23]

The reason for this difference in approach is plain. Where, as here, the issue is one of *actual conflict* with federally created rights, rather than merely "potential

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[23] Other post-*Garmon* decisions which have held state law to be preempted because of substantive conflict with the NLRA, rather than because of the Labor Board's primary jurisdiction include, *e.g.*, *Teamsters Union v. Morton*, 377 U.S. 252, 258-260; *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235, 240 (citing *Hill*); *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 635-637 and *Machinists, supra*, 427 U.S. 132, 148-151 (citing *Hill*). In none of these did the Court consider the strength of the state's interest.

As we stated in the text, *Belknap* is particularly instructive. The employer-petitioner relied on both lines of NLRA preemption doctrine; these were addressed separately in Parts III and IV of the opinion. The Court weighed the state's interest only in rejecting the employer's reliance on *Garmon*: "The state interests involved in this case clearly outweigh any possible interference with the Board's function that may result from permitting the action for misrepresentation to proceed." 51 L.W. at 5084.

frustration of national purposes" (*Garmon*, 359 U.S. at 244) whether substantive or administrative (*id.* at 241-246), the balancing of federal and state interests would be contrary to well-established general preemption principles:

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See also *Jones* v. *Rath Packing Co.*, 430 U.S., at 526; *Bethlehem Steel Co.* v. *New York Labor Relations Bd.*, 330 U.S. 767, 773 (1947). These principles are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U.S. 663, 666 (1962); see also *Ridgway* v. *Ridgway*, 454 U.S. 46, 54-55 (1981). [*Fidelity Federal Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. 141, 153.]

In sum, the constitutional balance has already been struck by the Supremacy Clause. See *Hill*, 325 U.S. at 542, quoted at p. 16, *supra*. As stated in *Wisconsin Board*:

> The National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Art. VI of the Constitution. Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand. [340 U.S. at 399.]

So here, since § 93(b) of the New Jersey Casino Control Act conflicts with the same federal legislation by restricting the employees' right to bargain through representatives *of their own choosing*, § 93(b) cannot stand.

III. THE PENSION AND WELFARE FUND DISQUALIFICATION IS PREEMPTED BY ERISA.

Section 93(b) of the Casino Control Act provides also that no labor organization may administer any pension or welfare fund if any officer, agent or principal employee is disqualified under § 86 of the Act. The court below held unanimously (J.S. App. 32a-33a) that this provision is preempted by § 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), which reads as follows:

> Except as provided by subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

Here, as in the court below, appellants "contend that § 93(b) of the Casino Control Act does not 'relate to' employee benefit plans within the preemptive contemplation of ERISA." Dep't. Br. 45.[24] The Court of Appeals responded:

> That contention is belied by the plain language of the New Jersey statute:
>
> > No labor organization . . . may administer any pension or welfare funds, if any officer . . . is disqualified in accordance with the criteria contained in section 86 of [the] act. N.J. Stat. Ann. 5:12-93(b).
>
> These words cannot seriously be said not to "relate to any employee benefit plan." 29 U.S.C. § 1144(a).

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[24] Argument on this point is presented only in the brief for appellants Brown, et al., which is adopted in this respect by the other appellants; see Comm'n. Br. 26 n. 6.

> ERISA states that statutes relating to employee benefit plans are preempted even when their effect is indirect. 29 U.S.C. § 1144(c)(2). These preemption subsections have been definitively construed by the Supreme Court. "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525. In light of that construction the contention that section 93 and ERISA may lawfully coexist is fanciful. [J.S. App. 32a-33a.]

A. The language of § 514(a) and the holding in *Alessi* provide more than ample basis for the Court of Appeals' conclusion. Moreover, shortly after the decision below, this Court in *Shaw v. Delta Air Lines, Inc.*, —— U.S. ——, 51 L.W. 4968 (June 24, 1983) (*"Delta Air Lines"*), again construed § 514(a), and in so doing removed any possible doubt that New Jersey's pension and welfare plan disqualification law is preempted by ERISA:

> We have no difficulty in concluding that the Human Rights Law and Disability Benefits Law "relate to" employee benefit plans. The breadth of § 514(a)'s pre-emptive reach is apparent from that section's language. A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Employing this definition, the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits clearly "relate to" benefit plans. We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning. (Citations omitted) In fact, however, Congress used the words "relate to" in § 514(a) in their broad sense. [*Delta Air Lines*, 51 L.W. at 4971, footnotes omitted.]

Appellants, while observing grudgingly that § 514(a) is a "complicating factor" (Dep't. Br. 45), fail to face up to the Court of Appeals' reasoning, or to *Delta Air Lines*' holding that the words "relate to" are to be read "in their broad sense." Section 514(a) truly complicates appellants' task in defending New Jersey's pension and welfare plan disqualification provision, but § 514(a) greatly simplifies preemption analysis with respect to employee benefit plans covered by ERISA; indeed, as Senator Javits, one of the chief sponsors of ERISA, explained, its broad preemption language was adopted in place of a prior "formulation" which:

> raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme. [120 Cong. Rec. 29942, quoted in *Delta Air Lines*, 51 L.W. at 4971 n.20.]

See also the statements of Rep. Dent and Sen. Williams, quoted at 51 L.W. 4971.

B. The "considerations" (Dep't. Br. 45) which appellants proffer to save the State's law are entirely insufficient. The first two of these, which can usefully be considered together, identify two purposes of § 514(a). On the premise that neither of these purposes would be frustrated if § 93(b) were not preempted,[25] it is contended

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[25] That premise is untenable. The second objective identified by appellants is "to prevent state interference with the results of collective bargaining between labor and management, as expressed in terms of a benefit plan itself, *Alessi*, *supra*, 451 U.S. at 525-526." Dep't. Br. 45. Since the provision of the plan which provides for the union's joint participation in its administration is the product of collective bargaining (and for the union and the employees an important safeguard), disqualification of the union would unquestionably subvert Congress' acknowledged desire to prevent such State interference.

that § 514(a) is inapplicable. This reasoning is flawed because it rests on an incomplete list of the objectives of ERISA's "virtually unique preemption provision".[26] Congress in § 514(a) also sought to "reserv[e] to federal authority the sole power to regulate the field of employee benefit plans"[27] and to avert "the possibility of endless litigation over the validity of State action * * *."[28] The State's statutory scheme here is squarely inconsistent with both objectives. But even if appellants had correctly characterized all Congress' objectives their conclusion would not follow. The clear command of statutory language is not to be overridden because an argument can be made that to do so would not frustrate the legislature's perceived objectives. On the contrary, the language must be adhered to unless it can be stated with conviction either that Congress affirmatively did not intend that the language be read literally (a contention which *Delta Air Lines* forecloses), or that a literal reading would actually frustrate the objective of the legislature (a contention which appellants do not even advance).

As their third point, appellants seize upon this Court's acknowledgment that there is "some confusion" as to the scope of ERISA preemption (*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523), and that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan" (*Delta Air Lines*, 51 L.W. at 4971 n.21). Dep't. Br. 46. But here again, it is decisive that, as *Delta Air Lines* establishes, Congress chose to resolve "confusion" by using the sweeping phrase "relate to" in § 514(a). And it cannot plausibly be asserted that § 93(b) affects employee benefit plans in only a "tenuous, remote, or peripheral" manner. Indeed,

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[26] *Franchise Tax. Bd. v. Laborers Vac. Trust*, —— U.S. ——, 51 L.W. 4945, 4952 n. 26.

[27] Remarks of Rep. Dent, 120 Cong. Rec. 29, 197 (1974), quoted in *Delta Air Lines*, 51 L.W. at 4971.

[28] Remarks of Sen. Javits, quoted in the text above.

as acknowledged at Dep't. Br. 44-45, ERISA itself disqualifies certain persons from serving as administrators, etc., of employee benefit plans; Congress thereby left no doubt that in its view such regulation does "relate to" an employee benefit plan.[29]

C. Appellants rely also on § 514(d) of ERISA, which provides in part that nothing in ERISA shall be "construed to alter, amend, modify, invalidate, impair or supersede any law of the United States," arguing that §514(d) saves § 603(a) of the LMRDA and that the latter "as construed in *DeVeau v. Braisted* * * * permits New Jersey to impose its own disqualification standards on officers engaged in casino gaming industries." Dep't. Br. 46.

This argument is entirely specious. As shown at p. 35 n.20, *supra*, § 603(a) of the LMRDA preserves (with exceptions not presently relevant) State laws from preemption by "this Act", that is, by the LMRDA itself. A determination that a particular State law is preempted by the later-enacted ERISA is therefore entirely consistent with § 603(a).

Appellants not only seek to accord § 603(a) of the LMRDA a significance that provision does not have, they fail to accord proper significance to this Court's rejection of an argument in *Delta Air Lines* almost identical to appellants' argument here. It was there contended that the contested provisions of the New York Human Rights Law were saved from preemption because § 514(d) of ERISA preserves Title VII of the Civil Rights Act of 1964 and particularly the latter's anti-preemption provision, § 708. This Court held that insofar as the New

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[29] Section 411(a) of ERISA, 29 U.S.C. § 1111(a), disqualifies persons who have been convicted of certain crimes from serving "(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or (2) as a consultant to any employee benefit plan." It is particularly noteworthy that unlike New Jersey's § 93(b), ERISA does not disqualify any labor organization because one of its officers or employees has been convicted of a disqualifying offense.

York statute prohibited conduct which was lawful under the federal Civil Rights Act, the state law was not saved by § 514(d):

> Although Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, see § 708, * * * it in no way depends on such extensions for its enforcement. Title VII would prohibit precisely the same employment practices, and be enforced in precisely the same manner, even if no State made additional employment practices unlawful. Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit. We fail to see how federal law would be impaired by pre-emption of a state law prohibiting conduct that federal law permitted. [51 L.W. at 4972, footnote omitted.]

So, too, the LMRDA is "neutral on the subject of all [union] practices it does not prohibit." And, *Delta Air Lines* held also that § 514(d) *does* preserve the New York Human Rights Law insofar as that Law prohibits conduct which is also prohibited by the federal Civil Rights Act. But this conclusion was reached only because, "[g]iven the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII's commands." 51 L.W. at 4972. The LMRDA, by contrast, does not rely on State laws to accomplish its objectives. Thus, preemption of State laws relating to the administration of employee benefit plans would not "impair" the LMRDA, and § 514(d) of ERISA cannot save § 93(b) of New Jersey's Casino Control Act.

D. Finally, appellants rely heavily on *Local 1804, Int'l. Longshoremen's Ass'n v. Waterfront Comm'n*, 85 N.J. 606, 428 A.2d 1283 (1981), where the New Jersey Supreme Court "considered whether Section 8 of the Waterfront Commission Act, which mandated removal of disqualified union officials upon conviction in the trial court,

was preempted by a contrary provision contained in Section 411(c) of ERISA, 29 U.S.C. § 1111(c) (J.S. App. 24a), which deems a union official 'convicted' [and thus disqualified] only after all appeals had been exhausted." Dep't. Br. 46. The New Jersey court and a federal district court in New York faced with the same issue,[30] answered that question in the negative, "[a]pplying the preemption analysis set forth by this Court in *DeVeau v. Braisted.*" Dep't. Br. 47.

It is, perhaps, sufficient for present purposes that the courts in these Longshoremen's Union cases did not have the benefit of this Court's construction of § 514(a) of ERISA in *Alessi* and *Delta Air Lines.*[31] However, we need not take issue with the ultimate conclusion reached by these courts. The *DeVeau* "preemption analysis" may be correct even with respect to employee benefit plans for purposes of that portion of the longshoring industry which is regulated by the Waterfront Commission Act, which, as both courts recognized, was approved by Congress. 85 N.J. at 615-617, 428 A.2d at 1288-1289;[32] 495

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[30] *Int'l Longshoremen's Ass'n v. Waterfront Comm'n,* 495 F. Supp. 1101 (S.D. N.Y.), aff'd in part and rev'd in part on other grounds, 642 F.2d 666 (C.A. 2), cert. den., 454 U.S. 966.

[31] Indeed, the plaintiff unions in those cases apparently did not even rely on § 514(a). The federal district court did not refer to § 514 at all, see 495 F. Supp. at 1124-1125. And the New Jersey Supreme Court referred to § 514 only in passing, observing, "Neither of the express exceptions is relevant. Consequently, we are remitted to construing congressional intent according to the three criteria of *DeVeau* to determine whether ERISA § 411(c) preempts section 8." 85 N.J. at 615, 428 A.2d at 1288. We submit that if the express exceptions to § 514(a) were, as that court wrote, irrelevant, the proper course would be to follow § 514(a)'s express preemption provision rather than *DeVeau*'s guides to ascertaining Congress' intent where there is no express preemption provision. However, because, as we shall show in the text, § 514(d) may be applicable to an interstate compact, the result of the Longshoremen's Union cases, though not all of their reasoning, may be correct

[32] The New Jersey Court said:

> Despite the broad preemption provision of ERISA, the unique consent clause to the Waterfront Commission Compact is per-

F. Supp. at 1124-1125.[33] For, given that approval the Compact appears to be a "federal law" preserved by § 514(d) of ERISA. But this does not aid appellants in this case. Where, as here, there has been no Congressional approval, and § 514(a) of ERISA indisputably governs, the "reasoning employed in *DeVeau*, as well as in the *Longshoremen* cases" cited by appellants (Dep't. Br. 47) is irrelevant because in enacting ERISA Congress squarely determined that "the substantive and enforcement provisions of the conference substitute [enacted as ERISA] are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. at 29933 (Senator Williams), quoted with approval in *Delta Air Lines*, 51 L.W. at 4971.

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suasive evidence of congressional intent not to preempt state action pursuant to the compact. * * * By approving the compact, Congress consented to stricter regulation of union officials in this narrow area. *DeVeau, supra*, 363 U.S. at 154. We conclude, therefore, that section 8 is not preempted by LMRDA §§ 504(c), 401(e) or ERISA § 411(c), and that the meaning of "convicted" under New Jersey law controls. [85 N.J. at 616-617, 428 A.2d at 1289.]

[33] The federal district court said:

In light of the special circumstances presented by waterfront union corruption, and given Congress' unique response approving the Compact with its enabling clause, it seems clear that Congress would tolerate if not commend WCA § 8's requirement that union officers resign or be removed before appeals are final, even though it is a departure from the federal rule. [495 F. Supp. at 1124-1125.]

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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